made by the Company to the Bank at this stage would be objected to as a fraudulent preference.

Whilst it is not necessary for me to decide this, the fact is that the evidence of commercial and actual insolvency in this case was overwhelming and I had no hesitation in making the order sought.

The Company must pay the costs of this hearing to the petitioning creditor and the supporting creditors.

Order accordingly.

Solicitors. *Ong Ban Chai & Co.; Subra Naicker & Co.*

NG CHIN SWEE & ORS. v. KOPERASI BELIA BERSATU BERHAD

[A.C.J. (Shankar J.) November 27, 1986]

[Johore Bahru – Civil Suit No. 23-975 of 1986]

Co-operative Societies – Deposit taking – Crisis of confidence – Failure to pay depositors in time – Appointment of firm to assume control and carry on business of co-operative society – Emergency (Essential Powers) Act, 1979, s. 2 – Essential (Protection of Depositors) Regulations (P.U.(A) 238), reg. 7, 8 & 9 – Essential (Protection of Depositors) Order 1986.

Practice and Procedure – Application for summary judgment – Appeal against decision of Registrar – Appeal to Judge – Dismissal of appeal – No stay of execution – R.H.C. 1980, O.14, 15 & 17.

The defendant Koperasi Belia Bersatu Berhad ("Kosatu") was registered under the Co-operative Societies Ordinance 1948 on January 17, 1977, by its founder Chairman, Tee An Chuan. Currently it has 67 operating branches located throughout Peninsula Malaysia with 14,541 members. It has 19 subsidiary companies. Deposit taking is the principal business of Kosatu. As at July 23, 1986, it has collected about $156 million from some 52,000 depositors, among whom are the 12 plaintiffs who had deposited with it $279,677.22. The plaintiffs reacted when they did not receive their money as promised on July 15, 1986.

Between May and July, 1986, there was a widespread crisis of confidence not only with regard to Kosatu but also other co-operatives in the country which did not remain unnoticed by the authorities. In exercise of the powers conferred by section 2 of the Emergency (Essential Powers) Act, 1979, the Yang di-Pertuan Agung made the Essential (Protection of Depositors) Regulations – P.U.(A) 238 ("the Regulations") which were gazetted on July 20, 1986, by order of the Finance Minister. Kosatu was a subject of a specific order made under Regulation 8 on July 23, 1986, and gazetted as the Essential (Protection of Depositors) Order 1986. On July 23, 1986, the Governor of Bank Negara in exercise of the power under Regulation 9(1)(b), appointed the firm of Ernst & Whinney to assume control and carry on the business of Kosatu with effect from July 23, 1986, until further notice. On July 30, 1986, the plaintiffs filed their writ. On August 8, 1986, the defendant entered appearance. On August 17, 1986, the plaintiffs filed their application for summary judgment. The defence of the defendant was filed on August 18, 1986.

Before the Senior Assistant Registrar, the defence was a bare denial coupled with a plea in the Bar that this action "is invalid in view of the suspension order made by the Central Bank of Malaysia." The Registrar found in favour of the plaintiffs. Kosatu appealed to the Judge.

Held, dismissing the appeal with costs: (1) there is nothing in the Essential (Protection of Depositors) Order 1986 or in the Regulations which has the effect of a moratorium which precludes third parties from filing claims against Kosatu. The action was properly filed. On the material before him, the Registrar very properly gave judgment against Kosatu;

(2) a depositor could withdraw at any time and would receive interest if the deposit had been left with Kosatu for 3 months;

(3) in the absence of an appeal, merits and special reasons, no stay of execution could be ordered.

Cases referred to:

(1) *Employers' Liability Assurance Corporation Ltd.* v. *Sedgwick Collins & Co. Ltd.* [1927] A.C. 95.
(2) *Windsor* v. *Chalcraft* [1939] 1 K.B. 279.
(3) *Atkinson* v. *The Bradford Third Equitable Benefit Building Society* (1890) 25 Q.B.D. 377.
(4) *Letchumi & Anor.* v. *Asia Insurance Co. Ltd.* [1972] 2 M.L.J. 105.
(5) *Evans* v. *Bartlam* [1937] A.C. 473.
(6) *Public Prosecutor* v. *Oie Hee Koi* [1968] 1 M.L.J. 148; [1968] A.C. 829.

APPEAL FROM REGISTRAR.

Ng Ah Ee for the plaintiffs.

Andrew T.C. Saw (*Leong Tuck Kong* with him) for the defendants.

Cyrus Das (*Romesh Abraham* with him) for the intervener.

Cur. Adv. Vult.

Shankar J.: This is an appeal by Koperasi Belia Bersatu Berhad (hereafter referred to as "Kosatu") against a summary judgment given against it in favour of the plaintiffs.

Kosatu was registered under the Co-operative Societies Ordinance 1948 on January 17, 1977, by its founder Chairman Mr. Tee An Chuan.

Currently it has 67 operating branches located throughout Peninsular Malaysia with 14,541 members. It has 19 subsidiary companies.

Kosatu's principal business is deposit taking. As at July 23, 1986, it had collected approximately $156 million from some 52,000 depositors. Some of these depositors are members. Others, like the plaintiffs, are the public at large.

As at July 1986, between them, the 12 plaintiffs had deposited with Kosatu $279,677.22. This global sum was made up by the individual amounts standing to the credit of each of the plaintiffs as evidenced by 42 Fixed Deposit receipts. Some of the plaintiffs had only 1 Fixed Deposit receipt and the others had varying numbers between two to five Fixed Deposit receipts each. However, the common feature of all 42 Fixed Deposit receipts was that their maturity date varied between March and September 1987. On July 7, 1986, the plaintiffs presented themselves at Kosatu's branch at Kota Tinggi. They saw the Branch Manager Mr. Teo Sin Heng and they insisted that they be allowed to withdraw the sums standing to their credit immediately. The reason for this precipitate attempt at withdrawal appears to be that between the months of May to July 1986, there was a run on certain of Kosatu's branches as a result of rumours concerning its mismanagement. Each of the Fixed Deposit receipts is in common form and the face of these deposit receipts contains the usual details including the maturity date. The rules regarding Fixed Deposit appear on the back on the receipts. Rule 2 states:

"Unless otherwise instructed deposit will be automatically renewed on maturity at our discretion for further identical periods. The rate of interest payable for each period will be depended upon the rate prevailing at the time the deposit is renewed." *(Sic)*

I would emphasise here that there is nothing in the rules which states that the depositor is not entitled to require his money to be returned to him before the maturity date. The plaintiffs did not succeed in getting paid on July 7, 1986. On July 8, 1986, they saw the Branch Manager again. They claimed that the Branch Manager informed them that the monies would be paid to them on or before July 15, 1986. By way of confirmation that this would be done, the Branch Manager gave them a copy of a letter dated July 8, 1986, addressed from the Kota Tinggi branch to the General Manager of Kosatu at Kuala Lumpur. It reads:

"Re Fixed Deposit Drawing Notification.

The depositor Mr. Ng Chin Swee would definitely be drawing this amount $80,530.27 on 15th July 1986.

Please issue the amount on 15th July 1986 or before."

A second letter was issued on the same day to cover the remaining $199,146.95. On July 9, 1986, the Branch Manager gave the plaintiffs a copy of a further letter which he had sent Kosatu's General Manager at Kuala Lumpur. *Mutatis mutandis* as to names and amounts which I have left blank, the letter reads:

"I, Teo Sin Heng I.C. No. 7657225 is the Branch Manager of Koperasi Belia Bersatu Bhd. Kota Tinggi branch on behalf of our company hereby guaranteed the total amount $..... deposited by ..... in our branch definitely secured. The above sum will be paid as soon as possible. We apologize for any inconvenience caused." *(Sic)*

But on July 15, 1986, the plaintiffs did not receive their money. And they reacted.

Between May and July 1986, there was a widespread crisis of confidence not only with regard to Kosatu, but also other co-operatives in the country which did not remain unnoticed by the authorities. The Court has taken note of the averment of Encik Nordin Haji Nasir, the secretary of Bank Negara Malaysia, who in his affidavit has confirmed that by July there was every possibility that if the situation went unchecked there would be a run on the branches of as many as twenty or more co-operatives throughout the country by thousands of depositors. This would have created panic and public disquiet with attended consequence of damaging the financial situation in the country. The authorities felt that erosion of public confidence in the co-operatives as deposit taking institutions during the present economic downturn was inimical to the Government's effort to boost an economic recovery.

So, in exercise of the powers conferred by section 2 of the Emergency (Essential Powers) Act 1979, the Yang di-Pertuan Agong made the Essential (Protection of Depositors) Regulation – P.U. (A) 238 ('the Regulations') which were gazetted on July 20, 1986, by command of Encik Daim Zainuddin, the Minister of Finance.

Putting it broadly, the Regulations were intended to empower the Central Bank to freeze the activities of any person or body in the business of deposit taking pending investigations into their

affairs, and in the meantime to stop any dealing in the property of such entities.

Kosatu was a subject of a specific order made under Regulation 8 on July 23, 1986, and gazetted as the Essential (Protection of Depositors) Order 1986 ('the said Order'). This Order was directed to each of the persons named in the Schedule thereto. The Schedule listed firstly Kosatu, secondly Encik Tee An Chuan who was its founder Chairman, followed by five other gentlemen who I presume were office bearers of Kosatu, and lastly any nominee, relative, employee or agent of any of the persons aforesaid. They and each of them were required to disclose to the Central Bank on or before August 1, 1986, all the properties and assets of Kosatu; not to sell, deal with or dissipate any of their individual monies or assets, or the monies or assets of Kosatu without prior approval of the Central Bank; not to remove any of the aforesaid assets out of the country, and not to leave Malaysia.

Regulation 7(c) provides:

"Where any investigation under these Regulations is being carried out, it shall be an offence for any person to –

(c) sell, dispose of, charge, pledge, transfer, or otherwise deal with, or dissipate, or remove from or send out of Malaysia, any monies, properties or assets belonging to any person referred to in regulation 4 without the prior written approval of the Central Bank."

It will be noted that the words in Regulation 7(c) and the words in Article 2(c) of the Order aforesaid are for all practical purposes in identical terms.

This is a convenient place to refer to Regulation 15. It provides that notwithstanding any provision to the contrary in the National Land Code 1965, or any other law relating to immovable property, the Central Bank has power to prohibit by Order published in the Gazette all dealings with such immovable property as may be specified in the Order.

The Regulations and the Order came into force on the date of their publication in the gazette *i.e.* July 23, 1986.

Meanwhile, on July 21 and 22, 1986, a representative of the Governor of Bank Negara had been having discussions with Encik A. Hanifah Nordin of Ernst & Whinney, a firm of Certified Public Accountants in Kuala Lumpur. After consultation with the Advisory Panel constituted under section 31A of the Central Bank's Ordinance 1958 and in exercise of the power under Regulation 9(1)(b), the Governor of Bank Negara did on July 23, 1986, appoint the aforesaid firm to assume control and carry on the business of Kosatu with effect from July 23, 1986, until further notice. The instrument of appointment is contained in a formal letter dated July 23, 1986. It recites that by virtue of the appointment Ernst & Whinney shall be deemed to be a public servant within the meaning of the Penal Code, and all the persons named in the Schedule to the Order aforesaid are compelled under Regulation 9(3)(b) to submit the business of Kosatu to their control. Regulation 9(1)(b) reads:

"Where the Central Bank is satisfied that any person is a deposit taker, it may do one or more of the following:

(b) assume control of and carry on the whole or any part of the business of the deposit taker as the Central Bank deems fit, or appoint any person to do so on the Central Bank's behalf."

And Regulation 9(3) provides that where a person has been appointed to assume control and carry on the whole or any part of the business of the deposit taker, such control shall continue until such time as the deposit liabilities of the deposit taker have been repaid or suitable provisions have been made therefore, or in the opinion of the Central Bank it is no longer necessary or expedient to do so.

It is to be noted that Regulation 9(1)(a) empowers the Central Bank to require the deposit taker to forthwith cease all activities relating to its business and refund all monies paid by any depositor in such manner as the Central Bank may direct. And Regulation 9(1)(c) empowers the Central Bank to apply to the High Court to appoint a Receiver. No suggestion has been made to this Court that the Central Bank invoked the aid of either of these two sub-sections. The impression given is that the only order that was made, was under Regulation 9(1)(b) which draws a distinction between the carrying-on of the whole or any part of the business of the deposit taker. In this case, the instrument of appointment by the Governor in favour of M/s Ernst & Whinney merely said that the appointment was "to assume control and carry on the business" of Kosatu.

My interpretation of this authorisation is that Ernst & Whinney were to assume control and carry on the whole of the business of Kosatu.

That being so, it must follow that the powers

of the Directors and office bearers of Kosatu were paralysed from July 23, 1986, until further notice.

On July 30, 1986, the present plaintiffs filed their Writ. On August 8, 1986, the defendants entered appearance, and on August 17, 1986, the plaintiffs filed an application for summary judgment. On August 18, 1986, the defendants filed their defence. It was a general denial of the plaintiffs' claims. The only substantial defence which was advanced was that by virtue of the statutory suspension order made by the Central Bank on July 23, 1986, this civil action had been invalidated and the Court divested of its power to give judgment for the plaintiffs.

Subsequently an affidavit was filed to show cause why summary judgment should not be given. The reasons pleaded in the defence were repeated but they did not find favour with the Senior Assistant Registrar who gave judgment in favour of the plaintiffs on September 4, 1986.

The defendants gave immediate notice of appeal. But the plaintiffs took prompt action to levy execution. Two pieces of land in Kuala Lumpur registered in the name of the defendants were made the subject of a Prohibitory Order. Three branch offices of the defendants in Johore State including the branch of Kota Tinggi were made the subject of a Writ of Seizure and Sale. In each case the Sheriff of this Court took the assets in question into his custody pending a sale by Public Auction.

The defendants' response was to apply for a stay of execution pending the hearing of the appeal, and I made an order to that effect on October 5, 1986.

Thereafter the Central Bank itself sought and obtained leave to intervene as an interested party, and after hearing the submissions of all concerned, I dismissed the appeal and ordered the stay of execution to be lifted. I further ordered that the costs of these proceedings be taxed and paid to the plaintiffs.

I will now deal with the issues raised in the course of these proceedings and give my reasons for deciding as I have done.

After the Writ in this action was filed on July 30, 1986, and served on Kosatu, M/s Ng Yook Woon, Andrew T.C. Saw & Company were instructed by M/s Ernst & Whinney to do the needful. They filed an appearance in the name of Kosatu. But was this correct? The Kosatu Board and Management had been paralysed by the relevant Essential (Protection of Depositors) Order made on July 23, 1986. That order was made because the authorities felt that the Kosatu Management had not acted in the best interests of its shareholders. Were M/s Ernst & Whinney responsible to Bank Negara or to Kosatu's shareholders and creditors? In Court, Mr. Saw, counsel for the defendant, said that he conceived his role as a protector of Kosatu and its directors. If that were indeed so, there was a clear conflict of interest here for the role of Bank Negara in this exercise was to investigate allegations of wrongdoing and to provide appropriate remedial measures.

The rule is that any person can be added as a party to civil proceedings between whom and any party to the cause or matter there may exist a question or issue arising out of the subject matter of the action which may conveniently be disposed of at the same time: See O.15 r.6(2)(b) of the Rules of the High Court and the *Supreme Court Practice 1985* – 15/6/7. But Ernst & Whinney came in not in their own name but in that of Kosatu. If a third party wishes to intervene in the name of the defendant, he can only do so with the defendant's leave. If the defendant cannot give leave, then a formal application to Court must be made for leave to which all concerned must be made parties (see *Employers' Liability Assurance Corporation Ltd.* v. *Sedgwick Collins & Co. Ltd.*[1] *and Windsor* v. *Chalcraft*[2]).

To regularise the position, Mr. Saw sought to submit at a subsequent hearing a formal resolution dated October 11, 1986, ratifying the appointment of his firm in these proceedings. This resolution was obviously ineffective since the powers of the Directors of Kosatu had passed out of their hands on July 23, 1986. The control of a business where the subject matter of the exercise is a corporation, must obviously involve the appointment of solicitors to act for it. And a Company can only act by its Solicitors (see *Supreme Court Practice 1985* para 5/6 and 4665). Mercifully however I do not have to decide whose interests Mr. Saw can properly represent. On October 19, 1986, Bank Negara sought for and obtained an order that they be allowed to intervene in this matter. They were interested parties and were clearly entitled to do so (see *Supreme Court Practice 1985* para 13/9/3), but in their own name.

The Appeal

Before the Senior Assistant Registrar, the defence was a bare denial coupled with a plea in bar that this action "is invalid in view of the suspension order made by the Central Bank of Malaysia." The affidavit to show cause was an elaboration of this same plea and it was claimed that this intent of the Legislature was implicit in the Scheme of the Regulations.

The Registrar found no merit in this defence and rejected it. The plaintiffs' claims were proved beyond a peradventure by the Fixed Deposit receipts issued by Kosatu and the damning admissions made by Kosatu's Branch Manager in his letters aforesaid.

On appeal and for the first time before me, it was sought to be argued for the first time that the sums claimed by the plaintiffs were not due and payable in July 1986 and that therefore there was no obligation on the part of Kosatu to pay till the maturity dates arrived.

Paget's Law on Banking (8th Edn.) page 158, *Atkinson* v. *The Bradford Third Equitable Benefit Building Society*,[3] *Letchumi & Anor.* v. *Asia Insurance Co. Ltd.*[4] and *Evans* v. *Bartlam*[5] were cited as authorities for the proposition that there was no legal liability to pay before maturity and that the Court had a discretion to allow the new point to be argued.

It is the view of this Court, that there is nothing in the said Order or in the Regulations which has the effect of a moratorium which precludes third parties from filing claims against Kosatu. The action was properly filed. And on the material before him, the Registrar very properly gave Summary Judgment against Kosatu. As for the new point, in the exercise of my discretion I hold it is too late for it to be raised now and it should be disregarded.

If I am wrong there, I would further hold that the Fixed Deposit Regulations of Kosatu No. 12(b)(1) which was issued by the Branch to the plaintiffs says that interest will not be paid only if a withdrawal is effected before the completion of three months. In other words a depositor could withdraw at any time and would receive interest if the deposit had been left with Kosatu for 3 months. I was totally unimpressed with a last minute attempt to urge that these Fixed Deposit Regulations were a private document of Kosatu to be used as a training programme handbook only. This averment of one Sim Keow Cheng was obviously hearsay evidence. He does not appear to have been a director of Kosatu in July 1986. Besides it totally ignores the estoppel created by the conduct of the Branch Manager in Kota Tinggi in stating that these Fixed Deposit Regulations applied and confirming the position by writing the letters he did to say withdrawal could take place on July 15, 1986.

Consequently I held the appeal is without merit and judgment was properly entered against Kosatu.

Could the Plaintiffs enforce the execution which they levied.

Mr. Saw relies very heavily on Regulation 7(c) to say that if a sale is carried out under the execution levied by the plaintiffs, they and the Sheriff of this Court will be committing a criminal offence. It is therefore urged that the execution should be annulled and the properties attached left *in situ.*

After the hearing on November 12, 1986, Mr. Cyrus Das tendered the White Paper headed "Report on Deposit Taking Co-operatives" (Ex. BN. 1) and "Investigation Report on Twenty-Four Deposit Taking Co-operatives" (Ex. BN.2). There are allegations of fraud and other misdemeanours arising out of undeclared conflicts of interests against the Chairman of Kosatu (see Ex. BN. 2 page 10 para 1.35 to 1.38). The special report on Kosatu at the end of Ex. BN. 2 makes dismal reading and ends with the conclusion that the estimated return to the depositors is not expected to be more than $0.30 for each ringgit deposited. The factual indications are that the investigations into Kosatu did not conclude with the Investigation Report in question. Indeed the Court can take judicial notice that a criminal prosecution is now pending against Mr. Tee An Chuan, Kosatu's ex-Chairman, who resigned on July 17, 1986.

There is no evidence before me that the Central Bank has come to the opinion under Regulation 9(3)(ii) that it is no longer necessary or expedient for the Central Bank or Ernst & Whinney to carry on with the business of Kosatu. It must be presumed therefore that they are still in control (see section 114(d) of the Evidence Act). Paragraphs 6.11 and 7 of Encik Nordin's affidavit dated November 8, 1986, also make it clear that the in-

vestigations are continuing and that the Investigation Report are preliminary only.

But Kosatu's appeal has been dismissed and in the absence of an appeal, merits and special reasons, no stay of execution could be ordered. Nowhere in Encik Nordin's affidavit is there any prayer that the execution should be lifted. So if the Sheriff is to release, who should ask for the hand-over?

I was informed from the Bar Table that the three branches of Kosatu which the plaintiffs attached in Johore were not in the custody of any representatives of Ernst & Whinney at any material time. If the assets therein had been left alone their fate would have been problematical. By attaching, the plaintiffs had been diligent enough to protect their rights and equity must aid the diligent.

Going back to first principles, if a judgment creditor attaches goods which a Third Party lays claim, it is for that third party to give notice to the Sheriff (see Order 17 rule 2 of the Rules of the High Court and *Supreme Court Practice 1985* page 246). The Sheriff can then apply for relief and the appropriate order will be made.

I specifically asked Mr. Cyrus Das, Counsel for the Central Bank, if he would initiate such proceedings, but his response was that his clients were not yet ready to exercise that option. Indeed it was indicated that the option may not be exercised and the Central Bank may decide to "let it go."

It is trite law that if Kosatu is insolvent, it is open to any of its creditors and there are at least 52,000 of them to present a winding-up petition. Under the Regulation 9(1)(d) the Central Bank has the power to present a petition for winding-up despite anything in the Companies Act 1965. Proceeds realised from a sale of Kosatu's assets will then automatically fall to be distributed amongst Kosatu's creditors in accordance with their priorities.

In this kind of situation where the Central Bank itself is not making a claim to the goods seized, it would be wholly unreasonable to construe Regulation 7 as having the effect of putting Kosatu's assets willy-nilly into limbo until such time as the Central Bank decides to act. If a man saw a Director of this Co-operative removing cash out of the till after the freeze order was made, would he have committed an offence if he physically recovered the money and paid it into Court? Mr. C.K.G. Pillay submitted on the authority of *Public Prosecutor* v. *Oie Hee Koi*[6] that "any person" in Regulation 7(c) must mean any person acting without lawful excuse or authority. I agree. *Mens rea* is an essential ingredient here. The absence of any written approval of the Central Bank is superfluous because the Central Bank is a party to these proceedings and bound by any order which this Court makes. Being fully cognisant of the attachment if the Central Bank chooses not to assert its claim in the manner provided by the Rules of this Court, it is my view that the sale must proceed in the normal way. Kosatu's directors, who should be voiceless anyway, whom Mr. Saw claimed to represent cannot use Regulation 7 *in terrorem* against lawful claimants. Mr. Saw says that if these plaintiffs are allowed to sue, the other depositors will do likewise; as if that should not be allowed to happen. But they too have a legal right to sue. The law must take its course.

Since my order, an appeal to the Supreme Court has been filed in the name of Kosatu and a stay of execution has also been ordered. It is obviously in the public interest that this appeal be disposed off as quickly as possible.

Order accordingly.

Solicitors: *A.E. Ng & Co.; Ng Yook Woon, Andrew T.C. Saw & Co.; Shook Lin & Bok.*

HIGHLANDS MALAYA PLANTATIONS LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Harun J.) December 31, 1986]

[Kuala Lumpur – Tax Appeal No. A2/83]

Revenue Law – Income Tax – Group Bonus Scheme – Managerial staff – Commission or bonus payment – Interpretation – Whether deductible as an expense – Appeal by taxpayer – Income Tax Act, 1967, ss. 13, 33 & 39(1)(h).

The appellant was a subsidiary of a company registered in the United Kingdom and was one of a group of 11 companies ("the Group") wholly owned by the principal company. The appellant and all companies in the Group were managed by agents and were in the plantation industry. All staff employed in the Group were engaged through standard letters of appointment and were transferable or interchangeable within the Group. Amongst its employees, there were two categories of staff *viz.* (a) the managerial staff (subject of this appeal) who, in addition to a monthly salary, were entitled to participate in the Group Bonus